

Brian Nester (*pro hac vice*)
bnester@sidley.com
Michael R. Franzinger (SBN 222155)
mfranzinger@sidley.com
Anna M. Weinberg (*pro hac vice*)
aweinberg@sidley.com
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

Richard A. Cederoth (*pro hac vice*)
rcederoth@sidley.com
David C. Giardina (*pro hac vice*)
dgiardina@sidley.com
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
Telephone (312) 853-7000
Facsimile: (312) 853-7036

Mike Bettinger (SBN 122196)
mbettinger@sidley.com
SIDLEY AUSTIN LLP
555 California Street
Suite 2000
San Francisco, CA 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-7400

Attorneys for Plaintiffs
ASUS COMPUTER INTERNATIONAL,
ASUSTEK COMPUTER INCORPORATED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ASUS COMPUTER INTERNATIONAL; and
ASUSTEK COMPUTER INCORPORATED,

Plaintiffs,

vs.

INTERDIGITAL, INC.; INTERDIGITAL
COMMUNICATIONS, INC.; INTERDIGITAL
TECHNOLOGY CORPORATION; IPR
LICENSING, INC. and INTERDIGITAL
PATENT HOLDING, INC.,

Defendants.

Case No. 15-cv-01716-BLF

**JOINT STATEMENT RE: PLAINTIFFS'
MOTION FOR LEAVE TO SUPPLEMENT
FACT AND EXPERT DISCOVERY**

Hearing Date: August 22, 2018
Time: 1:00 p.m.
Location: Courtroom 5, 4th Floor
Judge: Hon. Nathanael Cousins

**REDACTED VERSION OF DOCUMENT
SOUGHT TO BE SEALED**

1 **ASUS's Position:** A key issue in this case is whether InterDigital ("IDC") met its obligation
2 to license its declared standard-essential patents on fair, reasonable, and nondiscriminatory
3 ("FRAND") terms and conditions. IDC's witnesses testified that [REDACTED]
4 [REDACTED]. Throughout fact discovery,
5 IDC claimed privilege over [REDACTED] and related testimony. In response to a motion to
6 compel, IDC agreed to produce [REDACTED]
7 or communications—without waiving privilege. But four weeks after fact discovery ended and days
8 after maintaining general privilege assertions over its [REDACTED] IDC unilaterally produced [REDACTED]
9 [REDACTED]. IDC's economic experts Jonathan Putnam and
10 Anne Layne-Farrar opined extensively on these documents in their rebuttal reports. The
11 advantageous, selective disclosure of [REDACTED] violates the
12 sword/shield rule. *See Century Aluminum Co. v. AGC S Marine Ins. Co.*, 285 F.R.D. 468, 472 (N.D.
13 Cal. 2012). The untimely introduction of both documents also contravenes the scheduling order.
14 ASUS has moved to strike IDC's experts' reliance on the untimely produced evidence (ECF No.
15 220), and it maintains that request. In the alternative, and as the focus of the present brief, ASUS
16 seeks an order requiring IDC to produce [REDACTED] and to provide depositions of
17 Anthony Grewe, Ranae McElvaine, and Bill Merritt (all of whom previously testified on IDC's
18 licensing correspondence and discounting practices but were instructed not to answer questions
19 involving [REDACTED]) and a Rule 30(b)(6) witness on [REDACTED]. ASUS also seeks
20 leave to serve a supplemental report from its economic expert witness on these topics.

21 Because the [REDACTED] were produced after the close of fact discovery, ASUS
22 has not had the opportunity to depose any of IDC's fact witnesses about them. With its post-fact-
23 discovery [REDACTED], IDC proffers trial by ambush. The Federal Rules of Civil Procedure
24 "'contemplate... full and equal discovery so as to prevent surprise, prejudice and perjury' during
25 trial." *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 910 (9th Cir. 2008). The requested
26 depositions would lessen the prejudice IDC imposes and avoid subverting the full and fair
27 examination that discovery intends. Certainly, IDC's expert illustrates the importance of this
28 discovery by extensively [REDACTED]

1 [REDACTED] to analyze FRAND compliance.

2 IDC's untimely waiver of privilege also prejudices ASUS because it forced ASUS to conduct
3 fact discovery without [REDACTED]. IDC's expert contends the [REDACTED] are consistent
4 with [REDACTED], but ASUS cannot test this assertion because IDC withholds many other
5 [REDACTED] as privileged. With the new [REDACTED], IDC tries to present a carefully groomed,
6 limited set of facts, while avoiding discovery on central evidence. IDC's untimely production of and
7 reliance on the [REDACTED], is the kind of
8 selective use that the subject matter waiver rule is intended to prevent. *See* Fed. R. Evid. 502(a);
9 *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340-41 (9th Cir. 1996). IDC's reversal on privilege
10 warrants production of, and deposition questioning on, [REDACTED].

11 The parties resolved an earlier "privilege" dispute by agreeing that [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] (*See* ECF No. 220, Exs. 8-17). IDC cannot justify its decision to produce [REDACTED]
20 [REDACTED] only after the close of discovery and nearly 3.5 years after this suit commenced.
21 Context should not be lost. [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 [REDACTED] absent striking the untimely produced evidence.

25 During the parties' teleconferences on ASUS's motion, ASUS proposed a compromise
26 whereby IDC would produce the final versions of its [REDACTED], provide just one
27 deposition on [REDACTED] under Rule 30(b)(6), and accept a supplemental expert report from Dr.
28 Leonard on the subject matter at issue. IDC also raised a claim that ASUS's motion is untimely, but

that claim is baseless. It is not a motion to compel expert discovery. Regardless, ASUS raised this objection before expert depositions were completed. And it is IDC who chose to wait until long after discovery closed to waive privilege, producing and relying on discovery that IDC itself created. Moreover, ASUS's motion is timely. ASUS filed its motion 2 weeks after Dr. Putnam's July 18 deposition, in which he testified about [REDACTED]. Further, IDC's untimeliness claim fails to acknowledge the effort IDC imposed on ASUS by holding back nearly all of its expert evidence until the rebuttal round, serving 7 of its 10 reports on June 12 (with corrected versions up to 15 days later). Between June 13 and July 20, ASUS analyzed Dr. Putnam's rebuttal expert report, which was 464 pages long, prepared and took his deposition, and met and conferred with IDC to attempt to resolve amicably the parties' dispute. In that same period, ASUS prepared and defended the depositions of 8 of its own experts. In addition, ASUS analyzed the other IDC expert reports, totaling thousands of pages of opinion, and deposed several of IDC's experts. This case has been pending for nearly three and a half years and there is no justification for IDC's untimely production and post-discovery waiver of privilege.

InterDigital's Position: ASUS's request is a belated and improper attempt to backtrack on an agreement between the parties resolving ASUS's March 2, 2018 motion seeking "economic analysis and valuations of [InterDigital's] licenses." ECF No. 146 at 1. The parties resolved that dispute by [REDACTED]. [REDACTED] ASUS subsequently withdrew its discovery dispute on March 28, 2018. ECF No. 181. Now, four months later, ASUS seeks an order requiring production of [REDACTED]; *four* additional depositions, including a Rule 30(b)(6) witness; *and* leave to supplemental a report from an ASUS economic expert. ASUS's overreaching request after the close of fact and expert discovery is improper and should be denied.

As a preliminary matter, ASUS's motion is untimely, as it relates to issues ASUS initially raised *over six months ago*, and discovery has since closed. The deadline for filing motions to compel fact and expert discovery were March 23, 2018 and July 20, 2018, respectively. *See* Civil

1 L.R. 37-3; ECF No. 142. Courts in this district routinely deny motions to compel discovery for
 2 failure to comply with this Rule. *See, e.g., Cornerstone Staffing Solutions, Inc. v. James*, Case No.
 3 12-cv-01527, 2015 WL 13037133, at *1 (N.D. Cal. June 8, 2015); *Nuance Commc'ns, Inc. v. ABBYY*
 4 *Software House*, No. C 08-02912, 2012 WL 2838431, at *2 (N.D. Cal. July 10, 2012).

5 While ASUS contends that InterDigital's post-discovery production justifies its belated
 6 filing,¹ the motion is untimely even under that basis. ASUS admits that "[t]he dispute that is the
 7 subject of the Motion arose as a result of the production by [InterDigital] [REDACTED]
 8 [REDACTED] See ECF No. 219-6 at 3 (emphasis added).

9 But ASUS offers no explanation why it waited *almost four months* to file a motion seeking
 10 additional discovery allegedly prompted by InterDigital's April 12 production (ECF No. 220, filed
 11 Aug. 2, 2018); nor did ASUS even raise this issue with InterDigital until a meet and confer call on
 12 July 17. ECF No. 219-6 at 6. Rather than objecting at the time of production, upon receipt of
 13 InterDigital's expert reports, or even during expert depositions, ASUS waited until after the close of
 14 discovery to seek the "drastic remedy of striking an expert report." ECF No. 226. As this Court
 15 found previously, ASUS's pursuit of this discovery "after the end of fact discovery" shows "a lack
 16 of diligence." ECF No. 175 (citing ASUS's "tardy meet and confer" in finding ASUS had "not
 17 shown this requested discovery is proportional to the needs of the case under Fed. R. Civ. P. 26").²

18 ASUS's request is also improper because the parties already resolved their disputes
 19 concerning the production of [REDACTED]
 20 [REDACTED]

21 [REDACTED] See ECF No. 146. ASUS "should not be permitted to renege on a compromise of a
 22 discovery dispute, particularly where it has already made a representation on the record to the Court
 23 that an agreement had been reached." *Soto v. Commercial Recovery Sys., Inc.*, No. C-09-02842,

24 _____
 25 ¹ InterDigital's April 12 production was appropriate, as it could not have been made earlier. ASUS's
 26 claim that InterDigital contravened the scheduling order is disingenuous, as ASUS itself produced
 27 hundreds of documents after the close of fact discovery, and argued against reopening fact discovery
 28 to permit InterDigital to assert a new claim based in part on such documents. See ECF No. 199 at 9.

² Moreover, ASUS fails to meet (or even address) the standard set by Rule 16(b)(4) requiring a party
 to demonstrate "good cause" for modifying the scheduling order. See *Thomason v. City of Fowler*,
 No. 1:13-CV-00336, 2014 WL 4436385, at *6 (E.D. Cal. Sept. 9, 2014) ("[B]elated attempt to
 conduct or compel discovery . . . does not constitute good cause to modify the scheduling order.").

2011 WL 1298697, at *2 (N.D. Cal. Apr. 4, 2011); *see* ECF No. 181 (stipulating that parties “have reached agreements to resolve all of the disputes currently pending before the Court”).

In response to ASUS’s March 2 motion, InterDigital explained that it had already produced many potentially responsive documents, that some of the materials sought were subject to privilege, and that InterDigital would continue to perform a document-by-document privilege review and produce responsive materials accordingly. *See* ECF No. 146 at 4-5. Prior to the motion hearing, this Court “encourage[d] the parties to communicate with each other on [] remaining discovery disputes.” ECF No. 175. After the parties met and conferred, the parties resolved their disputes, ASUS withdrew its motion, and InterDigital agreed to and did provide ASUS [REDACTED]

Given the parties’ express agreement of non-waiver, ASUS’s arguments concerning subject matter waiver are unfounded, and its cited case law is inapposite. *Cf. Century Aluminum Co. v. AGC S Marine Ins. Co.*, 285 F.R.D. 468, 472 (N.D. Cal. 2012) (no non-waiver agreement). Additionally, ASUS ignores that [REDACTED]

[REDACTED]. Similarly groundless is ASUS’s claim [REDACTED]

Finally, ASUS suffered no prejudice. [REDACTED] were provided to ASUS prior to opening expert reports, two months before rebuttal reports, and three months before the close of expert discovery. ASUS had time to analyze and address [REDACTED] during expert discovery, but chose not to. Nonetheless, in an attempt to resolve this dispute, on August 8, 2018, InterDigital made a reasonable offer to allow ASUS to serve a supplemental report from its economic expert to address [REDACTED], which ASUS declined.

1 DATED: August 17, 2018

2 By: /s/ Michael R. Franzinger
3 Brian Nester (*pro hac vice*)
4 Michael R. Franzinger
5 Anna M. Weinberg (*pro hac vice*)
6 Mike Bettinger
7 Richard A. Cederoth (*pro hac vice*)
8 David C. Giardina (*pro hac vice*)

9 *Attorneys for Plaintiffs*
10 ASUS COMPUTER INTERNATIONAL, and
11 ASUSTEK COMPUTER INCORPORATED

9 Dated: August 17, 2018

10 By: /s/ Michael B. Levin
11 Michael B. Levin

12 David S. Steuer
13 Michael B. Levin
14 Maura L. Rees
15 Matthew R. Reed
16 WILSON SONSINI GOODRICH &
17 ROSATI
18 650 Page Mill Road
19 Palo Alto, California 94304-1050
20 Telephone: (650) 493-9300
21 Facsimile: (650) 493-6811

22 Lucy Yen
23 WILSON SONSINI GOODRICH & ROSATI
24 1301 Avenue of the Americas, 40th Floor
25 New York, NY 10019-6022
26 Telephone: (212) 999-5800
27 Facsimile: (212) 999-5899

28 *Counsel for Defendants InterDigital Communications, Inc., InterDigital Technology Corporation, IPR Licensing, Inc., and InterDigital Holdings, Inc.*

ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in the filing of this document has been obtained from the other signatories above.

DATED: August 17, 2018

By: /s/ Michael R. Franzinger

Brian Nester (*pro hac vice*)

Michael R. Franzinger

Anna M. Weinberg (*pro hac vice*)

Mike Bettinger

Richard A. Cederoth (*pro hac vice*)

David C. Giardina (*pro hac vice*)

Attorneys for Plaintiffs

ASUS COMPUTER INTERNATIONAL, and

ASUSTEK COMPUTER INCORPORATED